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Ministries of Truth: Free Speech and the Tech Giants

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INTRODUCTION

As the tech giants' influence has grown, they have increasingly become arbiters of truth. On their platforms, policies to promote community safety result in the removal of hateful or inciting content, but are malleable enough to envelop other unpopular viewpoints.[1] To skirt widespread criticism from their mostly free speech-embracing users, and to curate their platforms to be more subjectively palatable, companies have resorted to adjusting the exposure of certain voices rather than flatly censoring them.[2] The subjectivity of their policies has also resulted in concerted total bans between the large companies on speakers who, however distasteful to many, resonate with a large portion of the electorate.[3]

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[1] Menlo Park, *The deciders: How social-media platforms dispense justice*, THE ECONOMIST, (Sept. 8, 2018), https://www.economist.com/business/2018/09/06/how-social-media-platforms-dispense-justice.

[2] *Id.*

[3] *Id.*

Such an ability to target and oust voices from the political community reasonably raises eyebrows among those who share traditionally liberal values. Traditional American civics brings unpopular voices to the table and then holds a vote. Criticism from unpopular viewpoints is either disregarded after being heard, or used constructively. The modern tech giants—Facebook, YouTube, Twitter, and Google—in their role as guardians of information, may be beginning to part ways with this model. They are to credit for the vast democratization of expression and information. Yet the ages-old hubris they once seemed to diffuse could prove a specter difficult to escape.

It is a reasonable dilemma in which they should find themselves. Their platforms can be used as brush for the fires of compassion and violence alike. They can be used to radicalize disaffected young people just as easily as to raise awareness for a human rights issue or to bring attention to a serious flaw in a political candidate.[4] It is easy to see why the companies would feel a need to discriminate according to content or even speaker. The First Amendment also protects their right to do so.[5] But the slippery slope of content regulation exists just as much with privately owned fora as with government fora.[6] The question is whether the tech giants came to play such an important role in a political discussion that their power to subjectively moderate content poses a big enough civic problem to warrant government action; and secondly, whether such an action is effective.

This comment explores three principal methods for curbing the tech giants' speech curation, whether they would be effective, and whether they would be justified. And of course, the option of doing nothing. The First Amendment, though its spirit is the very object of legislatures' protection, prevents the government from usurping the companies' ability to decide what to circulate.[7] Legislatures must tread lightly, directing their efforts at peripheral abuses, rather than presuming to compel objectionable viewpoints. Finding violations of antitrust law,

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[4] SÉRAPHIN ALAVA, DIVINA FRAU-MEIGS & GHAYDA HASSAN, YOUTH AND VIOLENT EXTREMISM ON SOCIAL MEDIA: MAPPING THE RESEARCH 32 (Andreea Ernst-Vintila et al. eds., 2017).

[5] U.S. CONST. amend. I.

[6] *Defending Free Speech in the 21st Century*, CATO DAILY PODCAST (Oct. 22, 2018), https://www.cato.org/multimedia/cato-daily-podcast/defending-free-speech-21st-century.

[7] U.S. CONST. amend. I

leveraging the firms' "neutral platform" status, and perhaps even digging into the nuances of the First Amendment present methods for doing this.

One of the surest methods to ensure a vibrant diversity of thought and opinion might be antitrust law.[8] At almost no time in history have so few firms controlled so much market share in a widely used industry.[9] Governments have acted to spark competition before.[10] At the beginning of the twentieth century, the United States broke up monopolies in energy and railways, and at the end of it, in technology.[11] Though it has diminished in recent decades, antitrust could be applied to foster competition in a marketplace of speech platforms. Different speech-policy frameworks would compete for use, their merits inevitably distinguishing them, allowing all the more viewpoints to breathe. The looming boundaries of acceptable speech would decentralize, in keeping with our founding Enlightenment principles. This would also not prevent platforms from excluding content they abhor, nor would it preclude the government from prosecuting genuine threats, terrorists, or otherwise.[12] It would, however, dislodge the cultural stranglehold that the self-appointed shepherds of expression now hold, insofar as it does not reflect widespread, organic culture.

The distinction between regulation as a neutral platform and as a publisher also has dire implications for social media companies. Neutral platforms are absolved of liability—be it copyright, tort, etc.—for all content posted by their users.[13] They are seen as neutral intermediaries, having played no role in the speech at issue, other than to have facilitated its exposure to other users.[14] They must do this in a definitively *neutral* way to qualify for the liability exemption.[15] Publishers, by contrast, engage in the curation of content; their right to do so in whatever way they see fit is legally acknowledged.[16] Because publishers play an active role in deciding what may and may not be sent into circulation or bear their imprimatur, they are liable for the bale of content they ultimately

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[8] *The next capitalist revolution: Competition*, THE ECONOMIST, Nov. 17, 2018, at 13.

[9] THE ECONOMIST, *supra* note 1, at 52.

[10] THE ECONOMIST, *supra* note 8, at 13.

[11] THE ECONOMIST, *supra* note 8, at 13.

[12] Nicole Phe, *Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 131–32 (2018).

[13] *Id.* at 109.

[14] *Id.*

[15] *Id.* at 110.

[16] *Id.* at 106. *See also* U.S. CONST. amend. I.

produce.[17] At the moment, social media companies are considered neutral platforms, free from liability for users' posts, yet they also engage in curation.[18] They are thus potentially deserving of a publisher classification.[19] Exactly where they fall concerning this boundary has not been established with much clarity.[20] The government could leverage that fact to keep the tech giants' influence at bay.[21] However, that might not be enough to effect a long-term, reliably even-handed, and clear approach to the companies' content regulation. And it would require constant monitoring and allegations of unfair ideological discrimination against them.[22] Even then, the tech firms might be right to call the government's bluff. Subjecting these companies to liability for their users' content could shut them down overnight, a result that could be perceived by voters as worse.[23] A world with no social media might sound like a long-awaited respite, but the enormous economic and political detriments of their vanishing make it politically unviable. Congress could perhaps carve out liability parameters specifically for social media companies, though they would need to withstand First Amendment challenges.[24] There is also the political will to hold social media platforms accountable for the content they present for its own sake.[25] In recent years, for example, Facebook was used to facilitate the Rohingya genocide in Myanmar, and to crush dissent there and in China.[26]

A more circuitous and less likely route for restraining the tech giants from unduly altering American civics, but perhaps ultimately sturdier, is interpreting First Amendment rights of users as powerful

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[17] Phe, *supra* note 12, at 106.

[18] Sam Levin, *Is Facebook a publisher? In public it says no, but in court it says yes*, THE GUARDIAN (July 3, 2018, 2:00 AM), https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Phe, *supra* note 12, at 106. *See also* Levin, *supra* note 18.

[26] Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

enough to override certain company decisions. Though the First Amendment restrains governments and not private companies, the common law has construed several doctrines that might be of use to platform users.[27] The doctrines state that the government may regulate speech in a viewpoint-neutral way within spaces it designates as official fora.[28] Prager University is attempting to pry this doctrine a bit wider by suing YouTube for censoring its videos.[29] The case builds on the First Amendment grounds that in offering itself as a public platform on the internet, YouTube became a state actor and thus is subject to censorship stipulations.[30] There is some common law indication that such fora could even be under private ownership if designated for public use and subjected to viewpoint-neutral government regulation—such as requiring that the fora be viewpoint-neutral themselves.[31] If Facebook were considered a public forum, for example, around an election as in *Minnesota Voters' Alliance v. Mansky*, the government could intervene with its standards for the speech allowed.[32] However, this would not necessarily ensure a wider array of voices; it could even shrink the amount of content permissible around election time, as it did in *Mansky*.[33]

Even after postulating all approaches, many claim doing nothing is the wisest course. Markets tend to self-correct,[34] and there is no reason to presume the speech-platform market should be any different. Alternative platforms, like Patreon, Ello, and Diaspora, spring up with

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[27] *Id.*

[28] *See e.g.* Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876, 1885–86 (2018) (holding that regulation of political speech around election booths at election time was permissible because they are "non-public fora." The opinion leaves open whether private establishments could ever be designated public fora as well.); (holding that regulation of pamphlet distribution is permissible in airports because they are "non-public fora.").

[29] Mike Jayne, *Fairness Doctrine 2.0: The Ever-Expanding Definition of Neutrality Under the First Amendment*, 16 FIRST AMEND. L. REV. 466, 493 (2018).

[30] *Id.*

[31] *Mansky*, 138 S.Ct. at 1876 (2018).

[32] *Id.*

[33] *Id*. Though many who decry fake news might favor the goal of quelling information around election time, classical liberals, and all red-blooded Americans, should not. *Id.*

[34] *See* Mark J. Perry, *Free Market, Though Imperfect, Is Self-Correcting*, AEI, https://www.aei.org/carpe-diem/free-market-though-imperfect-is-self-correcting/.

increasing frequency.[35] Competition should accommodate an ever-widening swathe of viewpoints, and eventually reinstate the robust democracy our forefathers intended. This is not without merit; however, even the framers abhorred the extra-governmental centralization of power, viewing it as an equal threat to democracy.[36]

Part II of this comment describes in depth the relationship social media companies are forging with the modern world, including the dilemmas they face, the steps the firms take to resolve them, and the tangible effects of these approaches. Part III outlines the solutions: a principled laissez-faire approach, its virtues and its hazards; an expansion of First Amendment doctrine and its viability; the peripheral but potent approach of antitrust law; and finally, the touchiness of reform in the distinction between publishers and neutral platforms. The array of legal routes toward curbing tech companies' undue influence on American civics is wide but not unnavigable. The purpose of this comment is to provoke consideration of the free speech principle and determine how, or whether, to apply it to public companies that have become civic platforms. It examines the stakes liberalism faces in the twenty-first century.

I. CURRENT AFFAIRS: BIG TECH'S RELATIONSHIP WITH THE MODERN WORLD

A. The Companies' Dilemma

The dilemma tech firms face is real. Complicity in a widening scope of atrocities became possible by the ubiquity and adaptiveness of their products.[37] The persecution in recent years of the Rohingya ethnic group in Myanmar, as well as the military's grip over the population, was largely inflamed by the military's deliberate and insidious use of

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[35] *See e.g.* Jody McCutcheon, *7 Alternative Social Media Sites We Hope Will Crush Facebook*, ELUXE MAGAZINE, https://eluxemagazine.com/magazine/alternative-social-media-sites/.

[36] Steven G. Calabresi & Larissa Price, *Monopolies and the Constitution: A History of Crony Capitalism*, NW UNIV. SCH. OF L. SCHOLARLY COMMONS (2012), at 75. [Hereinafter Calabresi].

[37] Mozur, *supra* note 26.

Facebook as a fount of disinformation.[38] Facebook eventually acted to quell that government's abuse of the company's platform, but the military had already done massive damage.[39] There is a distinction between misrepresenting facts, as was done in Myanmar, and spewing abrasive opinions stateside.[40] But this distinction is often trickier to identify than it might seem. Most disinformation campaigns and psychological warfare deliberately blend some truth with their lies, making them more effective and less detectable.[41] That all is to say that the curation that the big tech firms engage in is capable of great material good, and the subtlety of its execution might be more important than first meets the eye.[42]

Easier than probing and uncovering hidden webs of disinformation is blocking express propaganda from known terrorist groups.[43] That type of content moderation is likewise more widely understood as a good thing.[44] ISIS's videos are known for being effective at appealing to their audience, and tech companies are encouraged to target them.[45] They would face a backlash for not doing so.[46] What separates that conduct from the targeting of voices at home that those at company headquarters subjectively feel threatened by, or construe as related to violence when they're not? The presence of a force that is able to make those determinations for such a wide swathe of people, without being beholden to the constitutional procedures and principles those people have struggled to institute, is a threat. Though the firms' decisions might currently be generally agreeable, and though the firms are accountable to a marketplace, it does not obviate the underlying ethical duties evidenced by the people's laws and Constitution. Whether it is reasonable for tech firms to exert force on a given political situation is a

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[38] *Id.*

[39] *Id.*

[40] *See also* Sara Salinas, *Twitter permanently bans Alex Jones and Infowars accounts*, CNBC (Sept. 6, 2018, 4:45 PM), https://www.cnbc.com/2018/09/06/twitter-permanently-bans-alex-jones-and-infowars-accounts.html. When Alex Jones was banned, however odious he may be too many, Twitter spoke about transparency and then gave no specifics at any point, only opaquely saying that he had violated community guidelines. *Id.*

[41] Mozur, *supra* note 26.

[42] *Id.*

[43] Phe, *supra* note 12, at 100.

[44] *See id.*

[45] *Id.* at 123.

[46] *Id.* It is of note that the transgression in such cases is rarely the spreading of false factual information, but is based more on ideological difference, as well as a fear of material violence. *Id.*

different question from whether it is wise in the abstract to give them the power to do so.

B. How They Monitor: What's Actually Going On?

It is important to first be informed on the actual practices of speech moderation the companies engage in. Whether Facebook, YouTube, Twitter, Google, and the like involve political viewpoint in the way they program their content-moderation algorithms is suspected and hypothesized with varying amounts of evidence.[47] The claim that they overtly target conservatives is just shy of having resounding proof.[48] But what is also likely is that problematically malleable content-review standards are interpreted in an ideological light, advertently or inadvertently, resulting in a double standard between voices competing on the platforms.

There is a great deal we do know about the procedures and guidelines the firms use to moderate content. Facebook's content moderation, for example, happens on numerous levels.[49] It happens either before the content is published (ex ante) or after (ex post).[50] Moderators can either curate reactively (once content is brought to their attention), or proactively (scouring the pages for improper content).[51] Finally, these methods can all either be automated or manual.[52]

Ex ante content can be moderated automatically in a matter of seconds.[53] For example, an algorithm will reference an image, against "hashes" or signatures of known copyrighted, or something worse like child pornographic images, and detect if the uploading image is a version of it; they can then block its publication.[54] The software that ultimately makes the judgment to prevent publication is regularly subject to updates

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[47] *What Is "Shadowbanning"?*, THE ECONOMIST (Aug. 1, 2018), https://www.economist.com/the-economist-explains/2018/08/01/what-is-shadowbanning.

[48] *Id.*

[49] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1630 (2018).

[50] *Id.* at 1636.

[51] *Id.* at 1630.

[52] *Id.*

[53] *Id.* at 1636.

[54] *Id.*

and machine learning.[55] Content that users tend to flag can become part of the software updates.[56]

As for manual, proactive ex post moderation, it is pretty much only done for terrorist speech.[57] A series of guidelines are established based on decisions committees make about which content to leave up and which to take down; those decisions form the basis for the guidelines that trickle down to moderating teams.[58] Manual, reactive ex post moderation is done either according to the company's established guidelines or as a reaction to users flagging content.[59] The ability of users to flag content benefits the company both in that it is a practical way of reviewing vast amounts of content, and it assuages concerns that the company's moderation methods are unilateral.[60] Because there is still obvious room for inappropriately subjective bases for regulating content when users flag, such as arguments between opposing viewpoints, Facebook funnels flagging through a system designed for users to resolve conflicts themselves.[61]

This is the point, when the moderators begin discriminating flagged content for preclusion or publication, at which the companies' opacity on the issue becomes more unsettling. Not a single large company published its guidelines for determining which content gets to stay and which must leave.[62] Additionally, the guidelines change more frequently than even the terms of service.[63] This further obfuscates the firms' moderation practices, and further skirts any recourse for their users.

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[55] *Id.* at 1637.

[56] *Id.*

[57] *Id.* at 1638.

[58] THE ECONOMIST, *supra* note 1.

[59] Klonick, *supra* note 49, at 1638.

[60] *Id.*

[61] *Id*. For example, a user reporting content will be prompted to select "Report/Mark as Spam," and then select why he or she feels it is such through buttons like, "Hate Speech," "Violence or Harmful Behavior," or "I Don't Like This Post." *Id.* They even allow users to report certain content to their friends and family if it is harassment or self-harm threats, and triage different types of threats so they can be attended to appropriately (terrorism or suicide before harassment or pornography). *Id.*

[62] *See* Catherine Buni & Soraya Chemaly, *The Secret Rules of the Internet: The Murky History of Moderation, and How It's Shaping the Future of Free Speech*, THE VERGE (Apr. 13, 2016), https://www.theverge.com/2016/4/13/11387934/ internet-moderator-history-youtube-facebook-red-ditcensorship-free-speech.

[63] *Id.*

Judging the flagged content against these mysterious guidelines are actual human beings—Facebook employees organized into three tiers.[64] Tier 3 comprises the day-to-day monitors, who interpret guidelines to the best of their ability.[65] Tier 2 moderators supervise those on Tier 3, and review content that was "escalated" or prioritized, such as credible threats of suicide, terrorism, or imminent violence, as well as types of content interpretation of which was inconsistent.[66] Tier 1 are lawyers and policymakers at the company's headquarters.[67] It is much like our system of court appeals in the United States: if there is a discrepancy in the way a certain type of content is treated by different Tier 3 moderators, then progressive tiers step in to standardize the decision making.[68] In the early days, moderators were recent college graduates in the San Francisco Bay Area, but now the job has been largely outsourced to third-parties, many in the Philippines, Ireland, Mexico, Turkey, India, and Eastern Europe.[69]

The company's Community Standards provided to the public are just a framework, the general motivators of regulatory action.[70] The real determiners of regulatory outcomes, though, stem from the internal rulebook under those Standards, and precedents past moderators have set.[71] These are complete with all the principles and multi-factor tests of common law judging.[72] They are unlike common law, however, in that decisions do not reason directly off past decisions but instead only use them by analogy.[73] Those internal rules and precedents remain opaque to

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[64] Klonick, *supra* note 49, at 1639.

[65] *Id.* at 1639–40.

[66] *Id.* at 1640.

[67] *Id.*

[68] *Id.* at 1641–42

[69] *Id*. It is interesting to note that these moderators are not Americans, with instinctively American approaches to distinguishing certain types of speech rights. This is a double-edged sword: moderators are both less conscious of American speech rights, but also less conscious of domestic biases. *See* Adrian Chen*, Inside Facebook's Outsourced Anti-Porn and Gore Brigade, Where 'Camel Toes' are More Offensive Than 'Crushed Heads*,' GAWKER (Feb. 16, 2012), https://gawker.com/5885714/inside-facebooks-outsourced-anti-porn-and-gore-brigade-where-camel-toes-are-more-offensive-than-crushed-heads.

[70] Klonick, *supra* note 49, at 1641–42

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1642.

the public.[74] Much training is done to the outsourced employees to provide consistency in moderation when each enters the profession with their own cultural biases and norms.[75] This is a rather involved process, instilling the cognitive perception necessary to override cultural or emotional reactions to the instinctual level of arriving at a resolution that "chicken sexers" possess.[76] This is effective; lawyers and judges exhibit a fraction of the bias that non-lawyers do in solving politically triggered legal questions.[77] The guidelines for relevant content require that certain types of information be excluded from the decision-making process, mirroring, for example, the Federal Rules of Evidence.

Once the procedural rules are followed so that the relevant information is identified, the actual Abuse Standards are applied.[78] This starts with a list of nine per se bans on content, enumerated, but also containing many exceptions.[79] Images of blood, exposed bone and tendon, and crushed heads or limbs (but only those in which insides are showing) are banned.[80] On the ideological side of the ban list, hate symbols like swastikas or images of Hitler or Osama bin Laden are automatic violations, "unless the caption (or other relevant content) suggests that the user is not promoting, encouraging or glorifying the [symbol]."[81] In some respects, the guidelines for the social media companies are more specific and less subjective than American First Amendment jurisprudence. For example, the legal test for obscenity from *Miller* asks whether the normal person applying contemporary community standards would find the material appeals to the prurient interests, whether it depicts conduct defined under law in a patently offensive way, and whether it lacks serious literary, artistic, political or scientific value.[82] The company's rules are far more specific.[83] Aside from that, the guidelines provide a list of protected categories of people, and somewhat echoing American jurisprudence, distinguishes between ordinary people, public figures, law enforcement officers, and heads of

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[74] *Id.* at 1663.

[75] *Id.* at 1642.

[76] *Id.* at 1643. *See also* Richard Horsey, *The art of chicken sexing* (2002), http://cogprints.org/3255/1/chicken.pdf.

[77] Klonick, *supra* note 49, at 1643.

[78] *Id.* at 1644.

[79] *Id.*

[80] *Id.* at 1644–45.

[81] *Id.* at 1645.

[82] Miller v. California, 413 U.S. 15 (1973).

[83] Klonick, *supra* note 49, at 1647.

state, factoring in whether they fall within these protected categories.[84] Defining and choosing categories of people to protect raises concerns about subjectivity.

Perhaps one of the most important things to understand about the content moderation in which tech firms engage is that the internal rules they create are in constant flux.[85] It might compound the concern the public has about the rules' opacity. There are four ways in which the rules can be subject to change: (1) government request, (2) media coverage, (3) third-party civil society groups, and (4) individual users' use of the moderation process.[86] The theory behind the categories allowed to influence the moderation "government" is that it is pluralistic: there are multiple external factions of equal force competing to influence it.[87] Although pluralism sounds valuable and democratic in theory, it can lead to undemocratic results in practice.[88]

Government Requests: In general, tech firms give governments what they ask for within a given country and remove content, even if it is not in violation of their policies.[89] For example, YouTube sometimes only geo-blocks content within a country.[90] Facebook, by contrast, removes content globally, if compliance requires.[91] Twitter, by yet another contrast, typically refuses to capitulate to political requests, although it does remove content that clearly violates a country's laws.[92] Other times, Twitter removes part of the content for other reasons, such as impersonation.[93] Tech firms were criticized for too often acquiescing to government requests, but, conversely, they developed entire anti-terrorism departments and policies.[94] No content whatsoever is allowed from terrorist groups, even if it is unrelated to terrorism, and hundreds of thousands of terrorist-related accounts have been terminated.[95]

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[84] Klonick, *supra* note 49, at 1645.
[85] Buni, *supra* note 62.
[86] Klonick, *supra* note 49, at 1649.
[87] *Id.* at 1649.
[88] *Id.* at 1650.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 1651.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1651.
[95] *See* Joseph Menn & Dustin Volz, *Exclusive: Google, Facebook quietly move toward automatic blocking of extremist videos*, REUTERS (June

Media Coverage: The media do not have a direct role in altering the content that appears on social media platforms.[96] But when media coverage is coupled with either the collective action of the platform's users or a public figure's involvement, platforms were responsive.[97] That is to say, the media spurs collective action of users that ultimately leads to a change in policy by the platform.[98] This happened when Facebook removed images of women breastfeeding, same-sex kissing, 19th century nude paintings, and doll nipples.[99] Because trust in the platforms' services is largely based on the democratic principles of their users,[100] it follows that the platforms should be responsive to collective, publicized complaints voiced in the media. This, however, can have an adverse effect on democratic values because those with more clout can crowd out voices espousing minority opinions.[101] For instance, the platforms only take down information that violates their policies when more journalistically well-known users post relevant information.[102] When the regular uses post information that violates the platforms' policies, the problem is not addressed.[103] While sometimes problematic, this methodology also has merit in other contexts. For example, Mark Zuckerberg decided to allow content that would otherwise violate the Facebook's policies when it is of public importance, which allowed content from the Trump campaign that otherwise would not have been allowed.[104] Criticisms that Facebook was not applying its terms of services equally and fairly had more credence, given the fact that the company was able to alter them in a way that adhered to the current political need.[105] The less immutable the policies, in other words, the less credible the principles that underpin them.

Third-party Influences: Although organizations like the Anti-Defamation League and the "Working Group on Cyberhate" do not exert

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24, 2016), https://www.reuters.com/article/us-internet-extremism-video-exclusive/exclusive-google-facebook-quietly-move- toward-automatic-blocking-of-extremist-videos-idUSKCN0ZB00M.

[96] Klonick, *supra* note 49, at 1652.

[97] *Id*.

[98] *Id.* at 1652–53.

[99] *Id.*

[100] *Id.* at 1653.

[101] *Id.* at 1650.

[102] *Id.* at 1655.

[103] *Id.*

[104] *Id. See also* Deepa Seetharaman*, Facebook Employees Pushed to Remove Trump's Posts as Hate Speech,* WALL ST. J. (Oct. 21, 2016), http://on.wsj.com/2ePTsoh.

[105] Klonick, *supra* note 49, at 1655.

any official force on the social media platforms, they have a special relationship, wherein the platforms know that content these organizations flag is serious and should be looked at right away.[106] Akin to perhaps an amicus brief or the policy work of think tanks, third-party organizations exert a more concentrated influence on the social media platforms.[107] This can be due to their expertise and research, but it also raises concerns that ideological viewpoints concentrated in these organizations could have unfair sway over the actual philosophical consensus of the population because even the consensus can marginalize voices.

The final substantial method that can yield change in moderation policy is the users' own content flagging and the subsequent decisions made about them.[108] This facet is perhaps most similar to the common law system. As issues arise, where no two are quite alike, the outcomes of those decisions end up shaping policy.[109] This assuages concern about the subjectivity of the constant policy updating because there can, in fact, be a legitimate reason for it. What differentiates this facet from the common law system is that companies also maintain efforts to preempt certain situations before they arise like when other, new situations occur that might trigger their awareness of a certain issue.[110] For example, the decision that certain disturbing content may be displayed in connection with its relevance—political or otherwise—to the public, arose from a series of similar actual situations flagged on social media platforms.[111]

This all is to say that the tech giants put a considerable amount of resources into the fairness of their moderation process. They also put a considerable amount of energy into keeping rules up to date with current political needs, which is conspicuous and leads to confusion among the regulated speakers.[112] The issue is whether the opacity that does exist, given the jurisprudence is not published for the public, deals with something that affects so many people that a lack of transparency could pose a civic problem. Is this such a big part of our lives that the public has a right to know what the guidelines are? Even if the current governors of information are as benevolent and liberal as they say, what

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[106] *Id.*
[107] *Id.*
[108] *Id.* at 1638.
[109] *Id.* at 1645.
[110] *Id.* at 1642.
[111] *Id.*
[112] *Id.* at 1650.

do citizens have to assuage their worries about a future with such consolidated power?[113]

C. Real-World Effects

Knowledge of the mechanisms and stated motivations of content moderation are useful; however, more powerful is knowledge of the effects of moderation around the world. They can be both detrimental and beneficial, both political and economic.

The political benefits reach both first- and third-world countries. As described above, social media monitors have targeted disinformation aimed at interfering with elections.[114] Though allegations that foreign disinformation campaigns played any determinative role in the 2016 presidential election have no confirmation, what is confirmed is that much disinformation was indeed peddled by accounts in different countries, like Russia.[115] Many advertisements targeted American cultural divisions—such as an image of Satan and Jesus arm-wrestling on behalf of opposing candidates; an image stating that the U.S. government dismantled the Black Panthers, yet the K.K.K. exists today; a Confederate flag and a call for the South to rise again; attacks on Hilary Clinton via promotions of Bernie Sanders; other ads attacking Donald Trump; others stoking hatred on both sides of the Black Lives Matter–police divide; and a buff, gay Bernie Sanders.[116]

On February 16, 2018, a notorious Russian "troll farm," known as the Internet Research Agency (IRA), received an indictment from Special Counsel Robert Mueller.[117] This conspiracy was operative as far back as two years prior and used stolen identities of U.S. citizens to usurp domestic credibility.[118] The indictment included allegations that the organization staged political rallies, and bought political advertisements in the names of U.S. citizens.[119] The Committee Minority

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[113] *See also* Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *EXPOSING RUSSIA'S EFFORT TO SOW DISCORD ONLINE: THE INTERNET RESEARCH AGENCY AND ADVERTISEMENTS,* U.S. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE (2018), HTTPS://INTELLIGENCE.HOUSE.GOV/SOCIAL-MEDIA-CONTENT/.

[118] *Id.*

[119] *Id.*

released a list of Twitter accounts associated with the IRA to bring awareness to the public of the risks of disinformation.[120] The striking thing about the Internet Research Agency case is the level of complexity allegedly wielded by the disinformation peddlers.[121]

> "[The Russian] social media campaign was designed to further a broader Kremlin objective: sowing discord in the U.S. by inflaming passions on a range of divisive issues. The Russians did so by weaving together fake accounts, pages, and communities to push politicized content and videos, and to mobilize real Americans to sign online petitions and join rallies and protests. Russia exploited real vulnerabilities that exist across online platforms and we must identify, expose, and defend ourselves against similar covert influence operations in the future. The companies here today must play a central role as we seek to better protect legitimate political expression, while preventing cyberspace from being misused by our adversaries."[122]

Furthermore, 3,393 advertisements were purchased, exposing more than 11.4 million American users to them, 470 IRA-created Facebook pages appeared, and, in response, 80,000 pieces of organically created content, which in turn reached over 126 million Americans.[123] Twitter was allegedly even worse, with more than 36,000 Russian-linked bot accounts tweeting about the U.S. election, approximately 288 million impressions of Russian bot tweets, and more than 130,000 tweets by accounts linked to the IRA.[124] Aside from the Russian influence campaign, other nefarious accounts sought to mislead voters about the election by posting incorrect dates and information related to voting.[125]

Although it is extremely difficult to measure how such advertisements affected the election, it is reassuring to many that the social media platforms have the power to slow down the spread of factually inaccurate information, or debatably even foreign opinions aimed at changing the minds of American citizens about their elections.

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*

At the same time, permeability to information and opinions from all over the world ought to be an American strength. Nonetheless, other benefits of the ability to regulate information include disruption of free-flowing propaganda surrounding the ethnic cleansing of the Rohingya people of Myanmar, and the cracking down on all terrorist propaganda currently pouring out of the Middle East, for which the companies receive criticism for taking too long.[126]

Political detriments resulting from the social media companies' conduct reach first- and third-world countries alike. The same attention the firms pay to disinformation also spread into the more subjective realm of ideology. Even when a speaker is only stating his or her opinion, it may run afoul of the companies' hate-speech criteria. For example, both the "Proud Boys" and Alex Jones were subjects of concerted social media bans, labeled far-right conspiracy theorists and even racists, with no semblance of due process; former group, for example, has members of different races and sexual orientations among its ranks.[127] Whatever their political label or their theories, they are citizens whose beliefs were their own, and whose threat to others was inferred by a block of people within a different, specific political camp. As the objective during the election was to minimize foreign interference, it seems somewhat contradictory to limit these quintessentially domestic groups in expressing themselves for lack of being palatable to their opponents. Not only did the social media companies ban the group because some of its members had gotten in a brawl on a New York City street—readily qualifying it as a "hate group" when the very group they were brawling against, Antifa, is an empirically far more violent group of masked thugs incidentally bent Leftward—but they admittedly banned any support and praise when they become aware of it.[128] That is to say, they remove *opinions* about the group that differs from the moderator's own.[129] This is especially egregious considering that this was not limited to opinions condoning the dreadful things of which the group is accused, but include opinions that

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[126] Mozur, *supra* note 26.

[127] Sean Burch, *Facebook Bans Right-Wing Group the Proud Boys and Founder Gavin McInnes*, THE WRAP (Oct. 31, 2018), https://www.thewrap.com/facebook-bans-proud-boy-gavin-mcinnes/. One of the accounts swept up in the ban was an amputee veteran supporting his family; others were proponents of violence. *Id. But see Twitter bans Alex Jones and Infowars for abusive behaviour*, BBC NEWS (Sept. 6, 2018), https://www.bbc.com/news/world-us-canada-45442417.

[128] Burch, *supra* note 127.

[129] *Id.*

the group does not, in fact, condone them.[130] It is unequivocally clear that company members did not like the group's message substantively. The group's message is offensive to some, as their two qualifications for entry are being male and "loving the West." Yet their "counterpart" Antifa is far more violent, engages in masked beatings of outnumbered victims on camera, and enjoys the luxury of multiple Facebook pages.[131]

Although the firms' discretion has proved helpful in some humanitarian crises, its potential for power concentration has also compounded them. During the Rohingya genocide in Myanmar, before the companies reacted to public pressure, the military's ability to manipulate the population was greater than ever before, as the public lacked adequate channels of information.[132] In China, Facebook was more than willing to abide by the Communist Party's censorship guidelines, though ultimately that relationship was thwarted by the current United States-China trade war.[133] "I think it's hard to have a mission of wanting to bring the whole world closer together and leave out the biggest country. At some point, I think that we need to figure it out, but we need to figure out a solution that is in line with our principles and what we want to do, and in line with the laws there, or else it's not going to happen," said Mark Zuckerberg.[134] While his remarks signal the company's desire to spread across the globe and provide access to information, they also indicate a willingness to curb that very information.

Assaults on free speech in Europe are also exacerbated by the platform's complicity, though to a lesser degree. In Europe, where free

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[130] *Id.*

[131] Antifa, FACEBOOK. Early in 2018, German authorities found a hoard of chemicals and a mobile bomb-making factory in the state of Thuringia linked to Antifa. Helmar Büchel & Claus Christian Malzhan, *Sprengstofffunde in der Antifa-Szene – Landesregierung unter Druck*, WELT (Mar. 17, 2018), https://www.welt.de/politik/deutschland/article174654378/Thueringen-Regierung-von-Bodo-Ramelow-nach-Sprengstofffunden-unter-Druck.html.

[132] Mozur, *supra* note 26.

[133] *Facebook's Big Plan to Set up a Subsidiary in China was Thwarted in Less than a Day*, NEWS.COM.AU (July 28, 2018), https://www.news.com.au/technology/online/social/facebooks-big-plan-to-set-up-a-subsidiary-in-china-was-thwarted-in-less-than-a-day/news-story/8e4fb296440f586435f56d4ab47a13bd. As a result, any reference to the Chinese subsidiary Facebook was trying to launch was pulled from the Chinese web. *Id.*

[134] *Id.*

speech takes a more compromised seat than it does in the United States, social media companies only change the application of their policies slightly to be in line with explicit legal differences. The differences are much subtler between the United States and Europe than they are between the United States and China, for example, and the difference in application mostly hinges on users' liability in their respective countries. In Austria, for example, the European Court of Human Rights invoked "religious peace" as a reason to limit criticisms of the Prophet Mohammed by way of an Austrian anti-blasphemy law that effectively gives credence to the religious beliefs of some simply because they would use violence to defend those beliefs.[135] Specifically, the criticism surrounded the prophet's marriage to Aisha, a six-year-old.[136] In Scotland, comedian "Count Dankula" was convicted for posting a joke video in which he trained his girlfriend's dog to raise his paw in salute in response to the words "Sieg Heil."[137] The video was not taken down; however, the sizeable audience that the judge thought might be offended by it was pivotal in the comedian's conviction.[138] Germany already imposed fines of up to £50 million on social media companies that do not delete illegal content within twenty-four hours of being notified.[139]

The benefits and detriments of the tech giants are not relegated to politics. They also find economic forms in both first- and third-world countries. The benefits of curating content can actually be quite practical for tech companies. Because the Internet is chaotic in nature, sites can gain an edge by making information organized and palatable to their users.[140] As the quantity of the information has grown, the quality has decreased.[141] The trust companies can build up with consistency and good judgment can help set them apart from their competitors, and also

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[135] Simon Cotee, *A Flawed European Ruling on Free Speech*, THE ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/ideas/archive/2018/10/europe-rules-against-free-speech/574369/.

[136] *Id.*

[137] Shappi Khorsandi, *The Conviction of Count Dankula Sets a Dangerous Precedent for Freedom of Speech*, THE INDEPENDENT (Mar. 23, 2018), https://www.independent.co.uk/voices/count-dankula-freedom-of-speech-comedy-joke-iran-offended-a8270631.html.

[138] *Id.*

[139] Pawan Deshpande, *4 Reasons Why Content Curation Has Gone Maintstream*, FORBES (June 4, 2012), https://www.forbes.com/sites/ciocentral/2012/06/04/4-reasons-why-content-curation-has-gone-mainstream/#42bf4a364fcb.

[140] *Id.*

[141] *Id.*

make the Internet more useful to users.[142] Conversely, demonstrating too strong of a bias can make a company less marketable, but only in a society that values objectivity. Though that trust can certainly be abused, which is the issue with institutional grips on markets, there is a certain degree of confidence one can have that the market will keep companies somewhat trustworthy—not necessarily in being objective or accurate, but in giving voice to different segments of that market.[143] It also makes the market of information more efficient in that it delivers the desired information directly to those who want it without the need to sift through it.[144]

II. SOLUTIONS

A. The Principled, Laissez-Faire Approach, and the First Amendment

The case is often made that the free market will ultimately keep whatever slant on information exists consistent with the values of the population—that this is democratic, and perhaps is itself the way in which meritorious ideas percolate as a free society intends. Who is the government to regulate how information must be disseminated into the public? Though the free market of ideas has its own problems and at times may not seem equitable, its problems are minor compared to those that occur once coercive force is introduced as acceptable in a society—even in the name of equity, which it often is.[145] If certain views are outnumbered, and are even ousted, from the fora, then those with the ousted views can simply set up another forum elsewhere.[146] This is an argument that most people can follow and are proud to identify in their surroundings, queue references to George Orwell's *1984*.[147]

Though this idea seems to exalt the traditional values America is known for around the world, it appears convoluted from another angle. The very spirit of the First Amendment is to protect against abusive majorities; the main way to do this is to properly restrain democratically

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Máire A. Dugan, *Coercive Power*, BEYOND INTRACTABILITY, (Sept. 2003), https://www.beyondintractability.org/essay/threats.

[146] *See also* McCutcheon, *supra* note 35.

[147] GEORGE ORWELL, 1984 (1949).

elected institutions of power. The other side of the coin sees that the heckler's veto in America is actually prohibited, and police are required to protect the right of minorities to speak, even in face of public mobs.[148] This affirmative obligation the Constitution bestows on the government to protect minority speech is not captured by the hands-off approach many advocate as the intellectually consistent way to keep the market of ideas fair. It is important to remember that the First Amendment also does not prevent Congress from passing an act of equity if it does not override anyone's right to free speech. In that light, the task at hand should be to formulate a way to protect minority speech from censorship by government and non-government actors, while steering clear of First Amendment rights.

But if there are groups that claim they are not given exposure to the market through social media firms, and if so many people, as they claim, are receptive to their ideas, then why do they not simply create their own platforms? A number of right-wing speakers and writers who felt their voices were stunted on the main channels of Twitter, Facebook, YouTube, and [less so] Instagram have sought platforms elsewhere.[149] "Patreon," for example, a website which "allows creators like you to have a direct relationship with your biggest fans, get recurring revenue for your work, and create on your own terms,"[150] is a platform to which a number of voices flocked.[151] The platform's selling point is that content creators have a direct line to their fans; they can charge monthly subscriptions themselves or charge pursuant to a specific project.[152] This flexibility allows the content creators to tailor their exposure and financing to their own needs.[153] It ostensibly makes the platform itself a less powerful force in the interaction. Another advantage that Patreon offers is more freedom from the pressure that accompanies advertising

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[148] *See* Feiner v. New York, 340 U.S. 515 (1951) (holding that officers may not arrest an individual for inflammatory speech that might cause others to become violent); Gregory v. City of Chicago, 396 U.S. 111 (1969) (holding that officers may not arrest protestors for allegedly causing others to violate an anti-disorderly conduct ordinance).

[149] Jason Wilson, *Gab: Alt-Right's Social Media Alternative Attracts Users from Twitter*, THE GUARDIAN (Nov. 17, 2018), https://www.theguardian.com/media/2016/nov/17/gab-alt-right-social-media-twitter.

[150] PATREON.COM

[151] McCutcheon, *supra* note 35.

[152] *What Is Patreon and How Does It Work?*, MEDIAKIX (May 25, 2017), http://mediakix.com/2017/05/what-is-patreon-how-does-patreon-work/#gs.mmGAudKS.

[153] *Id.*

dollars.[154] Because our day and age is one where commercial boycotting is a response to ever-subtler political disagreements, companies and content creators are forced to be concerned about any political implications their messages might have.[155] For example, YouTube recently encountered trouble when advertisers rescinded their business en masse upon discovering that their ads were being placed without their permission before videos they found objectionable.[156] In reaction, YouTube placed tighter restrictions on the definition of "advertiser-friendly" content, and in turn many content creators found that their advertising revenues were hit.[157] For those creators who are not yet well-funded and are subject to the pull of corporate advertising policies and brand partnerships, Patreon provides a platform to be freely connected to their fan base.[158] This initially drew in a lot of content creators who felt persecuted by larger companies.[159] The only catch was that they still had to be acceptable to Patreon.[160] The voices that tried to find refuge, instead, only found subjection to the same type of guidelines they originally fled.[161] And so the question remains: why don't those voices rejected by Patreon simply take out a loan, pay a tech person, and establish platforms that comport with their points of view?

The argument in response is that this same sort of discrimination simply takes place on ever-deeper levels. Even in a global market replete with expression platforms for every voice, there still exists an arbiter at some level who determines which platforms may even secure a domain

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[154] *Id.*

[155] *See, e.g.*, Jason Schwartz, *Big advertisers still shunning Ingraham's Fox News show months after boycotts*, POLITICO (Oct. 16, 2018), https://www.politico.com/story/2018/10/16/ingraham-fox-news-advertising-902466; Rich Duprey, *Gun Sales: Will Dick's Sporting Goods be hurt by a gun owner's boycott?*, USA TODAY (May 17, 2018), https://www.usatoday.com/money/.

[156] MEDIAKIX, *supra* note 152.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See Community Guidelines*, PATREON (2018) https://www.patreon.com/policy/guidelines.

[161] *See* Nicole Russell, *After One More Patreon Ban, Jordan Peterson And Dave Rubin Are Starting Their Own*, THE FEDERALIST (Dec. 21, 2018), http://thefederalist.com/2018/12/21/jordan-peterson-dave-rubin-plan-new-site-in-response-to-illiberal-ban/.

name. Many odious websites have been denied domain names.[162] Their odiousness, however, should not detract from the leeriness appropriate for a context in which so few have the power to decide what is seen. It seems advantageous that genuinely dangerous content could be censored independently without the expense of state resources. When we have clear conviction not to let government monitor our content, yet desire threatening content out of our midst, private monitoring appears to be an answer.

But a larger question remains: is a system of numerous discrete platforms, each with different content strictures, civically healthy? Isn't a fundamental merit of free speech the utility of ideas converging and conflicting and the consequent separation of the wheat from the chaff? Exposure to those odious messages is perhaps precisely what can diffuse them and is arguably one of the factors in America's relatively high degree of domestic political peace. If a liberal democracy should determine for itself what it detests, doesn't that first require knowledge?[163] If we are to bind together as a nation, even a nation that respects small, insulated communities, it does not follow that the decisions we must make together should occur in ignorance about the way each other group thinks. The value of public fora is just that: they are public. The participation of every citizen makes them more meaningful, more legitimate, and more powerful. That is to say, it is not necessarily un-American to place a civic scaffolding underneath the free market of ideas to ensure a free debate of conscience that is not skewed by disproportionately involved sectors of society.

There are some who question whether counter-speech is adequate to right the wrongs of misinformation.[164] They point to the 2016 presidential election and discussion surrounding "fake news" and question whether the doctrine, first articulated by Justice Louis Brandeis in *Whitney v. California*, can be as complex a remedy as the problem it

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[162] *See* Katie Mettler & Avi Selk, *GoDaddy – Then Google – ban neo-Nazi site Daily Stormer for disparaging Charlottesville victim*, WASHINGTON POST (Aug. 14, 2017), https://www.washingtonpost.com; Eli Lake, Opinion, *If You Can't Beat ISIS Online, Ban 'Em*, BLOOMBERG (Nov. 30, 2017), https://www.bloomberg.com/opinion/articles/2017-11-30/if-you-can-t-beat-isis-online-ban-em.

[163] Thomas Jefferson called knowledge "Light." This is evidence that exposure to ideas we dislike has also always been part of our civic foundation, not only autonomy.

[164] Phillip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 97 (2018).

aims to fix.[165] Specifically, they inquire into the structural and economic changes that affected the news media: increased fragmentation and bubbles, and increasingly algorithmically disseminated information, and how these affect the spread of news in ways that might make it more difficult for legitimate news to faithfully triumph over fake news.[166] This does assume, however, the objectivity of the term "legitimate," and accordingly overlooks one large premise of free speech: that no one has a monopoly on even the definition of that word.

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence," opined Brandeis in 1927.[167] He was right that enforced silence is not the wise government remedy, but this opinion does not speak directly to today's issue. Today's issue, instead, is the *facilitation* of falsehood and alteration of the very marketplace that allows meritorious ideas to percolate. This issue directly threatens the premise of Brandeis's opinion. In plainer terms, the speech on the platforms is not free in the first place but should be. Expanding public forum doctrine under the First Amendment to include social media platforms could remedy this, but the road is rocky.

B. Antitrust Law

Perhaps a sounder way to attack the problem, rather than by interpolating constitutional rights would be antitrust law. America, as well as its British predecessors, always abhorred monopolies.[168] This abhorrence adapted to its time—first starting with a rejection of government-granted monopolies, but eventually losing its roots in non-interventionism to instead become simply anti-monopoly.[169]

A brief history will inform the application of antitrust in the modern age. *Darcy v. Allein*, also known as the Case of Monopolies, was the first to abolish the practice of the government's giving exclusive rights to produce any article.[170] Before then, cases of royal monopoly

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[165] *Id.* at 75. *See also* Whitney v. California, 274 U.S. 357, 377 (1927).

[166] Napoli, *supra* note 164, at 68.

[167] *Whitney*, 274 U.S. at 377.

[168] Calabresi, *supra* note 36, at 7.

[169] *Id.* at 8.

[170] *Id.* That practice at issue there was brazenly abusive by today's standards: when Queen Elizabeth wanted more money than Parliament would appropriate to her, she simply sold monopolies where she pleased and shut the

grants were shielded from the common law and only heard instead in the royally administered Court of Star Chamber.[171] In striking down a monopolist's stranglehold on trading cards, the court opined that trades avoiding idleness was "profitable for the Commonwealth" even "to serve the Queen" and therefore state-established monopolies were "against the Common Law, and the benefit and liberty of the subject."[172] This is still valid law today. By the time the British colonists liberated themselves from this parasitic form, the egregious waste of government-granted monopolies was firmly in the population's knowledge.[173]

From this long struggle to throw off state oppression, the same anti-monopoly sentiment evolved in the new United States—especially as the twentieth century commenced.[174] At the Founding, many including George Mason and Thomas Jefferson wanted to secure a right against monopolies in the same way the right to free speech was later secured in the Bill of Rights.[175] However, this was tempered with the recognition, most prominently by Madison, of a need to secure the rights of private individuals for their own works, specifically in art and science.[176] After some compromise, our current constitutional framework ,with regard to monopolies, was agreed upon, which included the right to grant monopolies: only within the areas of science and art; only to the authors and inventors themselves, rather than to anyone who wanted to control an industry; only for grants with limited timeframes; and with the implied caveat that the monopolies would only be for the purpose of securing the fruits of those authors' labor rather than for government enrichment.[177]

The idea of freedom from monopolies came to the fore in the "Slaughter-House Cases" interpretation of the Fourteenth Amendment's privileges and immunities clause.[178] "No state shall make or enforce any

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English people out of entire trades. Those engaging in the royally monopolized trade were subject not only to a year's imprisonment, but also to have their left hand dismembered and hung up in the town market; a second offense yielded execution. "We are to let you understand," responded the Queen, "her Majesty's pleasure in that behalf that her Prerogative Royall may not be called in question for the valliditie of the letters patents." *Id.* Much worse than being let to eat cake.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id. See also* THE ECONOMIST, *supra* note 8, at 13.

[175] Calabresi, *supra* note 36, at 93.

[176] *Id.*

[177] *Id.*

[178] Slaughter-House Cases, 83 U.S. 36 (1873).

law which shall abridge the privileges or immunities of citizens of the United States."[179] Though obviously directed primarily at the deprivation of citizenship of former slaves, the amendment also encompassed other abuses that individual states exacted upon the free citizens of the country.[180] *Slaughter House* did not extend it so far, however, and only interpreted those rights already enumerated in the Constitution as being protected from abridgment by the states.[181] Because freedom from state monopolies was not a property of American citizenship, but rather of citizenship of that state, the smaller ones were allowed.[182]

Later, this arrangement prompted larger, federal action by President Theodore Roosevelt, who effectively extended the consumer's right to be free from monopolies to include freedom from anti-competitive conglomerates in general.[183] In the 1890s, the explosion of industry and economic efficiency that the new, classically liberal world order brought to Europe and America, came to be seen as leaving consumers (which, when extended to modern-day also includes political participants) open to abuse in their day-to-day lives that previously only governments had been able to achieve.[184] The abuses called for a modification in the definition of "monopoly" to also include private monopolies—both those that developed without special grants from the state, and products of "crony capitalism."[185] At this time, anti-monopoly sentiment may also have grown, in part, because there were so many new inventions—ones that we today consider commonplace ideas—that were still protected by patents. Reason would not have confused this with the swelling consolidation of private interests pulling state governments in one direction or another, but perhaps politics would have. Analogously, land monopolistically granted by the federal government upon which railroads were built was actually a traditional sort of monopolistic problem (government-grant), rather than simply a problem of pure

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[179] U.S. CONST. amend. XIV § 1.

[180] *Id.*

[181] Slaughter-House Cases, 83 U.S. at 124 (1873).

[182] *Id.*

[183] Calabresi, *supra* note 36, at 101.

[184] *Id.* at 95.

[185] *Id.* at 104. Because incorporating an entity at that time required an act by the legislature one corporation at a time, this lent itself to corruption. Incidentally, it was because of this that states moved to incorporate entities automatically once certain preconditions were met. *Id.* at 106.

largesse, success, and political sway.[186] Nonetheless, they stoked the same popular wrath. Senator Charles Sumner, a radical Republican and abolitionist, described monopolies as not only hostile "to the Union," but also "as hostile to the spirit of the age, which is everywhere overturning the barriers of commerce."[187]

Those who opposed the railroads did not restrict their anti-monopolistic sentiments to that industry.[188] They also generally opposed all of the large trusts, like Standard Oil and the large steel companies, simply on the ground that their sizes jeopardized liberty with the constant threat of government corruption.[189] Although it may be a fallacy to suggest that the government's corruptibility is a function of the success of its citizens, a better case can be made that inequality itself poses a threat to liberty.

The practice, and corresponding Act, with the most bearing on today's giants, though, was that large companies had the power to drive out competitors and drive up prices.[190] It is normal and healthy for companies to increase their market share, and restraining this directly as the means of benefitting the consumer is often more wasteful and illiberal than necessary. However, when companies are able to do this to box out competition, rather than simply by having a genuine competitive edge, this certainly harms the majority of people.[191]

The Sherman Antitrust Act of 1890 was directed at preventing privately established restraints on trade and at regulating cartels that emerged, particularly in the railroad industry.[192] This was acknowledged as somewhat of a paradox: that the government, in the name of consumer welfare, and ultimately liberty, would intervene into the private market.[193] Twenty-four years later, the 1914 Clayton Antitrust Act and the 1914 Federal Trade Commission Act were both passed to reinforce the Sherman Act.[194] By this point, culturally, the United States entered the "Progressive Era," and the fundamental arguments about the proper role of government, which underpinned the extension of anti-monopoly

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[186] *Id.* at 101.

[187] Cong. Globe, 38th Cong., 2st Sess., 792 (1865) (Statement of Senator Charles Sumner).

[188] Calabresi, *supra* note 36, at 81–84.

[189] *Id.* at 101.

[190] *Id.*

[191] FTC, ANTICOMPETITIVE PRACTICES.

[192] Calabresi, *supra* note 36, at 75.

[193] *Id.*

[194] Calabresi, *supra* note 36, at 101.

sentiment into the private sector, were less fiercely debated.[195] History shows there is certainly precedent, both legal and societal, for limiting forces that bear disproportionately on civic and economic matters.[196] Another modification in the definition of "monopoly" is not needed, only an extension in our understanding of its application.

Americans in the earlier two centuries of our history shared a negative view of monopolies, but that vehemence waned.[197] Accordingly, and because the modern-day tech companies pose a substantially unprecedented obstacle, the current antitrust framework has narrowed.[198] The Sherman Act's purpose was pointed, because it was passed against the populist concerns of its day.[199] A similar backdrop is needed today.

Section 1 of the Sherman Act prohibits "anticompetitive practices that are used to build and maintain market power," and invalidates "every contract, combination in the form of trust or otherwise, in conspiracy, in restraint of trade or commerce."[200] Section 2 prohibits the formation of monopolies and the activities that monopolize trade.[201] Section 2's broad language divided courts.[202] *Standard Oil v. United States* provided some clarity as to what exactly the statute prohibits, but not much: the "rule of reason" it produced stated, "[T]o leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute."[203] This rule tended to focus on public welfare, which later per se included prohibiting collusive pricing, market divisions, group boycotts, and cartelization.[204] Rule of reason jurisprudence outside the per se categories considers the restraint on

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[195] *Id.*

[196] Calabresi, *supra* note 36, at 118.

[197] Zachariah Foge, Note, *American Oligarchy: How the Enfeebling of Antitrust Law Corrodes the Republic*, 12 PEPP. J. BUS., ENTREPRENEURSHIP & L. 119, 123 (2019).

[198] *Id.*

[199] *Id.* at 131.

[200] Sherman Anti-Trust Act, 15 U.S.C. § 1 (2019).

[201] *Id.* § 2.

[202] RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 17 (rev. ed. 1996).

[203] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62, 64 (1911).

[204] PERITZ, *supra* note 202.

trade, "its context, purpose, and effect,"[205] taking into account "the nature of the industry, the reasons that the restraint was imposed, and whether or not it has the desired consequences."[206] The Clayton Act of 1914 then gave needed specificity to antitrust enforcement procedure by defining the prohibited conduct.[207] It added predatory pricing strategies to the list of prohibited activities, and strictures for mergers and acquisitions.[208] "Non-price" vertical restrictions were later added to the mix.[209]

The Chicago School then narrowed the rule of reason to focus on prohibiting inefficiency, rather than focusing on civic well-being.[210] The School heavily influenced the Supreme Court in the last quarter of the twentieth century.[211] Restraints on trade, as long as they were "efficient," became more legally acceptable.[212]

A return to the original interpretations of the Sherman Act would help society's cause against abusive tech firms. Originally described as an economic "bill of rights,"[213] the Sherman Act recognized that true freedom required the proper legal instrumentation, and that nations are civic societies as well as economies.[214] Anticompetitive behavior harms present competitors, and disincentivizes new ones to innovate and come to market;[215] but fewer companies with larger market shares can become "too big to fail," and intertwine themselves with democratic institutions to the peril of both.[216]

The tech giants are currently able to dance carefully within Chicago School jurisprudence, for example by keeping prices low to give

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[205] Foge, *supra* note 197, at 127; *see also* Christopher R. Leslie, Comment, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing.*, 81 CALIF. L. REV. 243, 247 (1993).

[206] Foge, *supra* note 197, at 127.

[207] Lina M. Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 723 (2017).

[208] *Id.* at 718; *see also* Clayton Act of 1914, 15 U.S.C. §§ 12-27 (2019).

[209] Foge, *supra* note 197, at 128; *see also* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 381–82 (1967).

[210] Kahn, *supra* note 207, at 718–19.

[211] Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 576–77 (1983).

[212] *Id.*

[213] Kahn, *supra* note 207, at 740.

[214] *See* Foge, *supra* note 197, at 19–20.

[215] Antonio F. Perez, *International Antitrust at the Crossroads: the end of antitrust history of the clash of competition policy of civilizations?*, 33 Law & Pol'y Int'l Bus. 527 (2002), at 554.

[216] *See* Foge, *supra* note 197, at 134–35.

the appearance of efficiency.[217] But the approach has resulted in less competition, higher prices, and fifty percent less small-business ownership.[218] Giant tech firms crowd out competitors, increasing prices and lowering wages.[219] As the market share of the top four has increased, the number of new entrants has decreased and productivity growth has been weak, likely explained by a lack of competitive pressure to innovate.[220] The firms create barriers to entry by buying prominent competitors, sharing users' data across their own subsidiaries, and restricting advertisements.[221] Big tech may be anticompetitive, especially if the definition were to broaden.

Applying these antitrust principles with a mind to quell speech censorship would be effective. Although it is not directly justified on speech-censorship grounds, that end could be achieved by regulation that would facilitate competition, and inevitably allow the expression of different viewpoints. Antitrust could be accompanied by intellectual property regimes that liberate individual users to take their information where they please, and by requiring big platforms to license anonymized bulk data to rivals.[222] Additional barriers to entry such as non-compete clauses, occupational licensing requirements, and complex regulations written by industry lobbyists could also be made less stringent, with a mind to ultimately increase competition and thereby expression.[223]

C. Platform/Publisher Distinction

The large tech companies understand the precarious state of their image and livelihood. Although they grew enormous and powerful, their existence still acutely depends on relatively nuanced aspects of their perception, as well as nuanced aspects of the law. They tread lightly, dodging antitrust transgressions, and they tiptoe around the distinction between neutral platform and publisher so as not to incur liability for their users' content.[224] When Mark Zuckerberg testified in front of the

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[217] Kahn, *supra* note 207, at 738.

[218] *The next capitalist revolution*, *supra* note 8, at 13.

[219] *Id.*

[220] *Id.*

[221] *See* Foge, *supra* note 197, at 120–21.

[222] *The next capitalist revolution*, *supra* note 8, at 13.

[223] *Id.*

[224] *See* Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018),

Senate in April of 2018, he was asked flatly whether Facebook was a publisher; his answer was notably less direct.[225] Presumably well counselled, he instead diverted his answer into one about *feeling* responsible for users' content, and being a "platform for all ideas" rather than a neutral platform.[226] The purpose of this was to steer clear of any trouble with Section 230 of the Communications Decency Act.[227]

The Communications Decency Act was enacted in 1996 for the purpose of fostering the growth of Internet companies by protecting internet service providers ("ISPs") from liability from screening content on their platforms.[228] Congress wanted to foster the growth of the young Internet by minimizing government regulation and giving power to new Internet companies themselves to monitor and screen for objectionable content without the constant fear of incurring liability.[229] It was based on the assumption that Internet companies need unbridled immunity to survive.[230] Prior to its enactment, the common law used a system of three categories to determine liability: primary publishers, distributors, and conduits.[231] Newspapers, bookstores, and phone companies respectively all were subject to different standards of liability.[232] Newspapers and other primary publishers were subject to the same liability as the original authors because they were in the best position to monitor and control content.[233] Distributors, on the other hand, were only liable for content if

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https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change.

[225] *Transcript of Mark Zuckerberg's Senate Hearing*, THE WASHINGTON POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/?utm_term=.33ed59037508.

[226] *Id.*

[227] Communications Decency Act, 47 U.S.C. § 230 (2018).

[228] Nicole Phe, *Social Media Terror: Reevaluating Intermediary Liability under the Communications Decency Act*, 51 Suffolk U. L. Rev. 99, 101 (2018).

[229] *See* 47 U.S.C. § 230(b)(1)-(2) (outlining policy reasons for passing § 230).

[230] *Id; see also* Valarie C. Brannon, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230*, Congressional Research Service (June 6, 2019), at 4, available at https://fas.org/sgp/crs/misc/LSB10306.pdf.

[231] *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH., 569-90 (2001).

[232] *Id.*

[233] *Id.*

they had actual or imputed knowledge of illegal, usually defamatory content which they failed to remove, because although distributers were not in the best position to monitor the content completely, they were in a good position to minimize harm.[234] The common law figured that conduits were too attenuated to be held accountable for content, even though they were implicated in but-for causation.[235] The inchoate nature of the Internet made this framework too difficult to work.[236] Courts found it difficult to characterize ISPs either more similar to bookstores and libraries, or as publishers with more editorializing power.[237] Eventually a split emerged.[238]

The court in *Cubby, Inc. v. CompuServe, Inc.* refrained from holding CompuServe liable and characterizing it as a distributor; instead, the court held it was more like "an electronic, for-profit library" with minimal editorial control over its publications.[239] The state of New York in *Stratton Oakmont, Inc. v. Prodigy Services Co.* decided instead that the ISP in question should receive the treatment of publishers because it represented itself to the public as having editorial control over the content posted on its bulletin boards, and furthermore had software that allowed them to screen and remove objectionable content.[240] This produced a murk in which, paradoxically, ISPs that attempted unsuccessfully to remove content subjected themselves to potential litigation, and those that made no effort whatsoever were free from it.[241] The secondary effects of this disparity were that companies would either give up from mitigating harmful content altogether, or go after it so strongly that it chilled free speech, contrary to the purpose and the dream of the Internet.[242]

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[234] Phe, *supra* note 228, at 101.

[235] *Id.*

[236] Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998).

[237] JOEL R. REIDENBERG ET AL., SECTION 230 OF THE COMMUNICATIONS DECENCY ACT: A SURVEY OF THE LITERATURE AND REFORM PROPOSALS 4, 6 (2012) (explaining how the novelty of the Internet motivated the passage of § 230).

[238] *See* Freiwald, *supra* note 231, at 569–90.

[239] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

[240] Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *4 (N.Y. Sup. Ct. 1995).

[241] REIDENBERG ET AL., *supra* note 237, at 5–6.

[242] *Id.*

When a proposition to extend "antiharassment, indecency, and antiobscenity [sic] restrictions" to ISPs was proposed in the Senate, it was exchanged for immunities within the CDA for "access providers," or those who merely serve as a means of access or connection to the Internet, and for entities that make "good faith" reasonable efforts to remove content once they were aware.[243] This latter defense provided some middle ground between the two extremities: ISPs were no longer forced to choose between risking liability and doing nothing at all.[244] Additionally, the Good Samaritan provision of Section 230 stated that "[n]o provider or user of interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[245] Section 230 goes on to make the distinction between entities that are "information content provider[s]" and "interactive computer service[s]."[246] The former is immune under Section 230, the latter is not.[247] Courts use a three-pronged test to determine whether immunity extends to a particular entity: whether an interactive computer service is used or provided; whether the entity can be considered an information content provider of the content or activity in question; and whether the cause of action seeks to hold the entity as a publisher or speaker of third-party content.[248] Thus, for social media companies, provided the cause of action is proper, because they obviously provide an interactive computer service, the question of liability really hinges on whether the online entity was in any way responsible for the creation or the development of the information.[249]

Section 230 was subsequently construed broadly in *Zeran v. AOL*,[250] applying the defense for all three previous common law liability categories: publishers, distributors, and conduits, and in *Blumenthal v. Drudge*, providing the defense despite the fact that AOL retained minimal editorial rights in a licensing agreement.[251] The Ninth Circuit in

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[243] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 61–63 (1996).

[244] *Id.*

[245] 47 U.S.C. § 230(c) (2012).

[246] *Id.* § 230(f).

[247] *Id.* § 230(c).

[248] Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. FED. 2d 37, § 2 (2011) (summarizing how various courts construe the scope of immunity under § 230(c) of CDA).

[249] *Id.*

[250] Zeran v. Am. Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997).

[251] Blumenthal v. Drudge, 992 F. Supp. 44, 44 (D.C. Cir. 1998).

Batzel v. Smith even went so far as to extend immunity to and ISP when it made minor edits to content and posted it against the author's intention.[252] These cases increased the scope of Section 230 immunity by broadening the construction of its second prong's "information content provider" language.

The only instances of narrowing this language, which would be a step in the direction toward making social media companies liable for their users' content, were the Ninth Circuit's decision in *Fair Housing Council v. Roommates.com, LLC* and a handful of House bills.[253] In *Roommates.com*, the court reasoned that a website that designed a registration process around questions and answers that it provided to prospective subscribers was thereby responsible for the "development" of the information and not immune from liability.[254] The court included situations where the website "contributes materially to the alleged illegality of the conduct," which enveloped Roommates.com's situation.[255] House Bill 1865 proposes to amend Section 230 to eviscerate immunity for and "ensure vigorous enforcement" against users and providers of Internet services for "sexual exploitation of children or sex trafficking."[256] It proposes to remove immunity for those who violate federal or state anti-trafficking laws, or any federal or state law that provides civil remedies to such victims.[257]

The Internet changed in a revolutionary way in the two decades since the passage of the CDA and has permeated most aspects of life. It no longer requires the same fostering of its growth as it did when it first started. The current state of Section 230 is that it immunizes ISPs as long as someone else provided the information.[258] It neglects, however, that often social media companies engage in more proactive roles than traditional publishers because they make conscious decisions about where to place advertisements based on who is using the platform,

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[252] Batzel v. Smith, 333 F.3d 1018, 1018 (9th Cir. 2003).

[253] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1157 (9th Cir. 2008).

[254] *Id.*

[255] *Id.*

[256] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 3, 132 Stat. 1253, 1253–54 (2018) (offering suggestions to amend § 230 to facilitate prosecution of online sex traffickers).

[257] *Id.*

[258] *See, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (holding that a social media website was not a publisher or speaker of content if it merely provided a neutral platform).

whereas Section 230 immunity was only intended to protect ISPs that served as neutral platforms for the dissemination of information.[259]

If the social media giants were held accountable for their users' content, they would shut down overnight. This is not desirable. Nevertheless, the threat of regulation could be enough to keep them in line. Otherwise, because their liability shield is statutory, a modification of the statute or the common law doctrine beneath it could permit the government to allow suits filed against the companies for certain discrimination situations. That avoids the First Amendment problems of direct government oversight.

Like the antitrust route, this would not directly make social media companies liable for selective political censorship. Instead, it provides leverage to force them to stop censoring, by presenting the prospect of unmitigated liability. The courts could begin to narrow Section 230's liability to exclude social media companies that engage in political censorship, characterizing them as "internet content providers" on the grounds that they engage in such practice. However, chastising the companies for one behavior with a mind to change another is not really a task suited for the judiciary. Instead, political will can wield the system of incentives needed to temper the tech giants' biases. Statutory carve-outs specifically aimed at companies that engage in political censorship would be appropriate modifications to the CDA for the modern Internet age.

CONCLUSION

The titans of tech have helped usher in an age of unprecedented human connection. Unprecedented too, is the power they've amassed by their roles in the process. In light of this power, their malleable and fluctuating standards of use pose a civic issue for liberal societies. Increased administrative centralization, brought about by the companies' enormous market share for speech platforms, compromises the robust debate on which the West prides itself. Whether it be through trust busting, de-immunization from liability, or the construction of constitutional rights, what is needed in this area is a revitalization of the classically liberal values that have made the world freer and more prosperous. As the world changes evermore quickly, law and government, which should be the people's tools for liberty, should be continually reshaped for the task at hand

[259] Phe, *supra* note 228, at 129.